NAVAJO RESOURCES, INC.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 81-44-A Decided August 25, 1982

Appeal from disapproval of oil lease of Navajo tribal trust lands.

Affirmed.

1. Indian Lands: Leases and Permits: Oil and Gas--Indian Lands: Tribal Lands

Sec. 2 of the 1938 Tribal Mineral Leasing Act, codified at 25 U.S.C. § 396b (1976), requires advertisement for competitive bids prior to leasing of unallotted tribal lands for oil and gas development where the leasing tribe is not organized under the provisions of the Indian Reorganization Act of June 18, 1934.

APPEARANCES: Lawrence A. Ruzow, Esq., for appellant; Chedville L. Martin, Esq., Office of the Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 8, 1980, the Navajo Area Director, Bureau of Indian Affairs (Area Director, Bureau) refused to approve a negotiated oil and gas lease on Navajo tribal land. The proposed lessee, an Indian owned corporation, appeals from a May 29, 1981, decision issued subsequently by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (Assistant Secretary) which affirmed the Area Director. 1/ The basis for the decision appealed is stated thus:

> 1. One of the basic provisions of the 1938 Tribal Mineral Leasing Act (25 U.S.C. 396b) is the requirement that oil and gas leases on tribal land shall be advertised for competitive bid prior to leasing by another method.
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> Since the leases concerned here are almost sixty (60) years old and have recently been terminated for lack of production, any new leases on the land involved must be advertised according to this requirement.
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> 2. The regulations which implement statutory authorizations, contained in Title 25, Code of Federal Regulations, can be waived by the Secretary pursuant to satisfactory justification and where permitted by law. However, a statutory requirement for advertising is concerned here, which only Congress has the authority to change.

1/ In appellee's brief, filed Dec. 4, 1981, the Bureau raises for the first time a challenge to the timeliness of this appeal. The record does not show, however, when the decision of May 29, 1981, was received by appellant. In the absence of a showing that the appeal is not timely made, untimeliness cannot be inferred by the Board under Departmental regulations governing appeals. See 25 CFR 2.10(a). In this connection, it is parenthetically noted that the Bureau now also seeks to bolster its position on appeal by arguing that it has consistently applied the rule announced in the Assistant Secretary's May 29, 1981, decision to all tribes engaged in mineral leasing. Since appellant had earlier sought to discover this identical information and was denied access to Bureau records showing administration of tribal mineral leasing generally, the Board has disregarded these arguments as being without foundation in the record on appeal.

> 3. One of the primary requirements in justifying a Secretarial waiver of regulations is that such an action must be determined to be in the best interest of the Indians involved. Even if the advertising requirements were not statutory, it would be very difficult, if not impossible, given the current market conditions in the oil and gas industry, to make a determination that a negotiated lease in the subject case was in the best interest of the Navajo Tribe as a whole.

(Decision dated May 29, 1981, at 1).

Appellant contends that reliance upon the provisions of the Tribal Mineral Leasing Act of May 11, 1938 (Leasing Act), 52 Stat. 347, 25 U.S.C. § 396b (1976), was error in this case because the statute does not clearly require advertisement for bids.

Further, appellant reasons that the proviso contained in 25 U.S.C. § 396b permitting tribes organized under the Indian Reorganization Act of June 18, 1934 (IRA), 48 Stat. 985, 25 U.S.C. §§ 464-479 (1976), to escape the statutory advertisement requirement denies appellant due process and is contrary to more recent enactments of Congress, citing the Indian Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. § 1301-1341 (1976), and the Indian Self-Determination Act of January 4, 1975, 88 Stat. 2203, 25 U.S.C. § 450 (1976). Finally, appellant argues that execution of the lease negotiated with the tribe is in the best interests of the tribe. Thus, appellant points out that the lease proposed to be approved in this instance is of an old field which the Bureau canceled in 1978 for lack of oil production in paying quantities. It is argued that it is unreasonable given such circumstances to require advertisement for lease of a fully explored field, and

that 25 U.S.C. § 396b does not provide the exclusive basis for lease of tribal oil lands.

[1] The Leasing Act is the statutory authority for the leasing for mining purposes of unallotted lands within an Indian reservation, or lands owned by any tribe, group, or band of Indians under Federal jurisdiction. Section 1 of the Leasing Act provides that such lands, with the approval of the Secretary of the Interior, may be leased for mining purposes by the tribal council. Section 2 of the Leasing Act provides these procedures for leasing of tribal lands for oil and gas development:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations:

(25 U.S.C. § 396b).

The Department has previously interpreted this statutory provision to mean that a lease for development of oil and gas may be made only after advertisement for bids. 2/ An exception to the requirement for advertisement appears in the proviso to section 2 of the Leasing Act:

2/ Solicitor's Opinion, M-36007, 60 I.D. 331, 332 (1949).

> Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided, and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

(25 U.S.C. § 396b). The apparent meaning of the Leasing Act, and the construction which it has been given in prior decisions of the Department, is that the advertisement requirement imposed as a prior condition to oil and gas leasing is absolute except in the case of tribes organized under the IRA--and then it does not apply provided those tribes have enacted alternative methods for oil and gas leasing in their charters. 3/ Should an IRA tribe fail to establish alternative methods for mineral leasing in its organizational documents, it will remain subject to the provision of the Leasing Act requiring advertisement for bids prior to lease.

Since the Navajo Tribe is not an IRA tribe, it is not entitled, as a matter of law, to claim to be excluded from the provisions of section 2 of the Leasing Act requiring advertisement prior to leasing. Appellant's arguments that the Leasing Act should not be applied to the lease negotiated with the Navajo tribe on the theory the Leasing Act violates later announced congressional policy or because the refusal to apply an exception to the Leasing Act to the negotiated lease in this instance results in a constitutional due process violation raise questions beyond the competence of this

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3/ See Petition of Cobb, 58 I.D. 637, 646-48 (1944), an early Board of Appeals decision which analyzed in detail the application of the Leasing Act in an appeal involving oil and gas leasing on the Blackfeet Reservation by an IRA tribe under tribal organizational documents providing an alternative method for oil and gas leasing.

Board to address. 4/ It is the opinion of the Board that the Assistant Secretary's decision correctly applied the Leasing Act as implemented by current Departmental regulations to the proposed lease to find a requirement for advertisements for bids prior to leasing in this case. 5/

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Jerry F. Muskrat
Administrative Judge

4/ See, for example, the discussion in United States v. Aberdeen Acting Area Director, 9 IBIA 151, 156, 89 I.D. 49 (1982), concerning the scope of Board review. The Board is without authority to declare acts of Congress invalid. Estate of Jackson, 6 IBIA 52 (1977).
5/ The Department has published rules at 25 CFR Part 171 to implement the Act. 25 CFR 171.2 requires the superintendent concerned to advertise prior to leasing of tribal land for oil and gas leasing. The advertisement procedure is prescribed at 25 CFR 171.3. The Board notes that Congress is close to broadening the means by which mineral exploration and production may be effected on tribal land. On June 30, 1982, the Senate passed S. 1894 (the Melcher bill), proposed legislation which permits Indian tribes to enter into alternative agreements other than simple leases following competitive bidding to develop mineral resources. The bill passed the House with amendments on Aug. 17, 1982.